Supreme Court, U.S.
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In The

Supreme Court of the United States

MEMORIAL MEDICAL CENTER,

Petitioner,

vs.

MELVIN GODWIN and CONNIE GODWIN,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of New Mexico

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION I:

Whether deviation from a standard emergency room screening procedure establishes a prima facie showing of an inappropriate medical screening examination under the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd(a) (1994), as was decided by the New Mexico Court of Appeals, despite contrary rulings from the United States Courts of Appeals of the First, Fourth, Sixth, Eighth and Eleventh Circuits.

QUESTION II:

Whether a hospital fails to satisfy its EMTALA, 42 U.S.C. § 1395dd(a) (1994), screening obligations by failing to provide an appropriate medical screening after new symptoms and medical conditions arise while the patient is being treated in the emergency department, as was decided by the New Mexico Court of Appeals, despite contrary rulings by the United States Courts of Appeals of the First and Fourth Circuits.

QUESTION III:

Whether the ninety day notice-of-claim provision of the New Mexico Tort Claims Act, N.M. Stat. Ann. §§ 41-4-1 to 41-4-27 (Michie 1976) is pre-empted by the two year statute of limitations provision in EMTALA, 42 U.S.C. § 1395dd(d)(2)(c)(1994), as was decided by the New Mexico Court of Appeals despite contrary rulings by the United States Courts of Appeals of the Second and Ninth Circuits.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, Defendant-Appellee/Cross-Appellant below is Memorial Medical Center.

Respondents, Plaintiffs-Appellants/Cross-Appellees below are Melvin Godwin and Connie Godwin.

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PETITION FOR WRIT OF CERTIORARI

Memorial Medical Center ("MMC"), the Defendant in the trial court and Appellee/Cross-Appellant in the court below, respectfully petitions for Writ of Certiorari to review the decision of the New Mexico Court of Appeals.

OPINIONS BELOW

The decision of the New Mexico Court of Appeals in *Godwin v. Memorial Medical Center*, 25 P.3d 273, 130 N.M. 434, 2001-NMCA-033 (N.M. Ct. App. 2001), *cert. granted*, 26 P.3d 103, 130 N.M. 459 (N.M. 2001), *cert. quashed*, 46 P.3d 100 (N.M. Apr. 26, 2002) is reprinted in its entirety in Appendix A. The February 4, 1999 Amended Order of the district court for the Third Judicial District, County of Doña Ana, State of New Mexico, is reprinted in Appendix B. The Order of the New Mexico Supreme Court granting Defendant-Appellee/Cross-Appellant's Petition for Writ of Certiorari is reported at 26 P.3d 103, 130 N.M. 459 (N.M. June 4, 2001) and is reprinted in Appendix C. The Order of the New Mexico Supreme Court quashing the Writ of Certiorari is reported at 46 P.3d 100 (N.M. Apr. 26, 2002) and is reprinted in Appendix D.

JURISDICTION

The New Mexico Supreme Court entered its Order quashing the Writ of Certiorari on April 26, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

The Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (1994) provides in pertinent parts:

> (a) Medical screening requirement
>
> In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.
>
> * * *

(d) Enforcement

(2) Civil enforcement

(A) Personal harm

Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

* * *

(C) Limitations on actions

No action may be brought under this paragraph more than two years after the date of the violation with respect to which the action is brought.

* * *

(f) Preemption

The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section.

The New Mexico Tort Claims Act, N.M. Stat. Ann. § 41-4-16(A) and (B) (Michie 1976) provides:

A. Every person who claims damages from the state or any local public body under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall cause to be presented to the risk management division for claims against the state, the mayor of the municipality for claims against the municipality, the superintendent of the school district

for claims against the school district, the county clerk of the county for claims against the county, or to the administrative head of any other local public body for claims against such local public body, within ninety days after an occurrence giving rise to a claim for which immunity has been waived under the Tort Claims Act, a written notice stating the time, place and circumstances of the loss or injury.

B. No suit or action for which immunity has been waived under the Tort Claims Act shall be maintained and no court shall have jurisdiction to consider any suit or action against the state or any local public body unless notice has been given as required by this section, or unless the governmental entity had actual notice of the occurrence. The time for giving notice does not include the time, not exceeding ninety days, during which the injured person is incapacitated from giving the notice by reason of injury.

STATEMENT OF THE CASE

Petitioner MMC was, at all relevant times, a hospital with an emergency department subject to the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd (1994). MMC was, at all relevant times, a governmental entity as that term is used in the New Mexico Tort Claims Act, N.M. Stat. Ann. §§ 41-4-1 to 41-4-29 ("NMTCA") (Michie 1976). Respondent Melvin Godwin was a patient at the emergency department of MMC and Respondent Connie Godwin is his wife.

On August 15, 1994, after a work accident, Mr. Godwin went to MMC's emergency department complaining

of back pain. Mr. Godwin was examined and evaluated by Dr. Boyd[1] and discharged after the evaluation. On August 23, 1994, Mr. Godwin once again presented at the emergency department of MMC with a chief complaint of low back pain. A nurse performed triage and took his vital signs noting that no neurologic symptoms were present. A primary nurse then assessed Mr. Godwin and did not find anything wrong with his lower extremities, pulses or neurological check. The emergency department physician, Dr. Boyd, then did an assessment noting Mr. Godwin's complaints of diffuse back pain with no trauma, radiating to his hips and with no neurologic symptoms. Dr. Boyd took a history from the patient and performed a physical examination. Dr. Boyd ordered pain medication which was given to Mr. Godwin.

When the hospital was getting ready to discharge Mr. Godwin, Dr. Boyd spoke to him again. Mr. Godwin said he was having trouble moving his right leg. Dr. Boyd re-evaluated Mr. Godwin and ordered a CT scan of the lumbosacral spine. At this time, there had been a significant change from the initial evaluation when there was no leg weakness. Dr. Boyd testified that he did not know what was going on with Mr. Godwin and excluded everything he could think of at that time. Dr. Boyd did not consider a thoracic spine injury because he had never seen one without major trauma. Dr. Boyd eliminated the neck as

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[1] Dr. Boyd is not an employee of MMC, but rather is an emergency room physician employed with Emergency Health Services Associates of New Mexico. The Godwins' medical malpractice claim against Martin Boyd, M.D. and Emergency Health Services Associates of New Mexico has settled out of court and is not the subject of the appeal.

the source of the weakness based on a previous negative cervical x-ray and the fact that the weakness was limited to one leg. Mr. Godwin was discharged with right leg weakness, etiology unclear, back pain, musculoskeletal. Instructions were given to Mr. Godwin to make a neurology appointment as soon as possible.

Two days later, Mr. Godwin returned to MMC complaining of back pain and numbness in his legs. After an MRI of Mr. Godwin's thoracic spine revealed a subdural hematoma compressing his spinal cord, MMC transferred Mr. Godwin to a hospital in El Paso, Texas, that was equipped to perform surgery to remove the hematoma. Mr. Godwin now has paralysis of his lower extremities.

In August of 1994, MMC had no neurologist available directly to the emergency room department on an "on call" schedule. However, a consulting schedule for a neurologist was available if the emergency room physician had deemed it appropriate to have Mr. Godwin admitted to the hospital. Mr. Godwin was not admitted. Also in August of 1994, MMC had a policy for screening patients with spinal cord injuries. Mr. Godwin was not suspected of having a spinal cord injury.

Mr. Godwin first gave notice of his intent to file a suit under the New Mexico Tort Claims Act to MMC on December 20, 1994, more than ninety (90) days after his August 23, 1994, visit to the emergency department at MMC.

The Godwins initially brought this action against Dr. Boyd and his employer, a corporation retained to provide emergency room services for MMC. The complaint originally alleged only medical malpractice. On August 2, 1996, the Godwins amended the complaint to include MMC as a

defendant alleging violation of EMTALA and vicarious liability for Dr. Boyd's medical malpractice. On December 18, 1997, MMC moved for summary judgment dismissal of the EMTALA claim. Following additional discovery, MMC renewed its motion for summary judgment on the EMTALA claim and also submitted a motion for summary judgment dismissal of Mr. Godwin's EMTALA claim and malpractice claim against MMC because Mr. Godwin did not meet the notice requirements under the New Mexico Tort Claims Act.

The trial court's decisions on all summary judgment submissions are embodied in its Amended Order dated February 4, 1999. This Order reflects that the Godwins agreed to dismiss all malpractice claims against MMC, leaving EMTALA as the only source of liability against the hospital. In denying MMC's EMTALA-based motion for summary judgment, the lower court found a material issue of fact as to whether MMC provided an adequate screening of Mr. Godwin in accordance with EMTALA. The lower court further found a material question of fact regarding the notice issue under EMTALA. The trial court certified the following issues as appropriate for interlocutory review to the New Mexico Court of Appeals:

1. Whether Plaintiff Melvin Godwin created a fact issue sufficient to rebut MMC's Motion for Summary Judgment seeking the dismissal of the EMTALA claim, more specifically delineated as:

    a. Whether an inadequate screening-based EMTALA claim under 42 U.S.C. § 1395dd(a) requires evidence of disparate treatment;

    b. Assuming evidence of disparate treatment is required to support an inadequate

screening-based EMTALA claim under 42 U.S.C. § 1395dd(a), whether Melvin Godwin submitted facts sufficient to rebut MMC's entitlement to summary judgment on this claim;

c. Whether Melvin Godwin submitted facts of actual knowledge of the requisite emergency medical condition sufficient to rebut MMC's entitlement to summary judgment dismissal of Melvin Godwin's discharge-based EMTALA claim under 42 U.S.C. § 1395dd(b);

2. Whether Melvin Godwin created a fact issue on either incapacity or estoppel sufficient to defeat MMC's Motion for Summary Judgment on the issue of notice under the NMTCA [New Mexico Tort Claims Act].

On February 19, 1999, MMC filed an application for interlocutory appeal. The Application sought the New Mexico Court of Appeals' immediate review of the trial court's denial of its summary judgment motion with respect to the substantive EMTALA claim and the notice argument. On March 26, 1999, the New Mexico Court of Appeals assigned MMC's appeal to the general calendar. After full briefing and oral argument, the New Mexico Court of Appeals issued its Opinion on April 5, 2001. MMC petitioned the New Mexico Supreme Court for Writ of Certiorari and presented the following questions for review:

1. Whether the notice requirement of the New Mexico Tort Claims Act ("NMTCA"), NMSA 1978, §§ 41-4-1 *et seq.* is applicable to the Godwins' claims under the Emergency Medical Treatment

and Active Labor Act, ("EMTALA"), 42 U.S.C. § 1395dd.

2. Whether the Godwins presented sufficient evidence in support of an EMTALA screening claim under 42 U.S.C. § 1395dd to defeat MMC's entitlement to summary judgment.

On June 6, 2001, the New Mexico Supreme Court granted MMC's Petition for Writ of Certiorari. The issues were briefed and oral argument was presented. Thereafter, on April 26, 2002, the New Mexico Supreme Court quashed the Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS REGARDING WHETHER A DEVIATION FROM AN EMERGENCY ROOM SCREENING PROCEDURE ESTABLISHES A PRIMA FACIE SHOWING OF AN INAPPROPRIATE MEDICAL SCREENING EXAMINATION UNDER THE EMERGENCY MEDICAL TREATMENT AND ACTIVE LABOR ACT, 42 U.S.C. § 1395dd(a) (1994).

The Emergency Medical Treatment and Active Labor Act ("EMTALA"), as added by § 9121(b) of the Consolidated Omnibus Budget Reconciliation Act of 1985, 100 Stat. 164, and as amended, 42 U.S.C. § 1395dd, places obligations of screening and stabilization upon hospitals and emergency rooms that receive patients suffering from an "emergency medical condition." *Roberts v. Galen*, 525 U.S. 249, 250, 119 S. Ct. 685, 142 L. Ed. 2d 648 (1999).

The United States Supreme Court has addressed conflicts among the United States Courts of Appeals arising from interpretation of the stabilization requirements, § 1395dd(b) in *Roberts v. Galen*, *supra*. The Supreme Court has not yet resolved conflicts that have arisen among the United States Courts of Appeals regarding interpretation of § 1395dd(a) which covers emergency room screening requirements.[2] This Petition presents the Supreme Court with a critical opportunity to erase the Circuit split existing on the interpretation of EMTALA's screening requirement

The New Mexico Court of Appeals, in *Godwin*, has issued a decision that is in direct conflict with the First, Fourth, Sixth, Eighth and Eleventh Circuits. Interpretation of § 1395dd(a) is an important question of federal law that needs uniformity, and thus should be settled by the United States Supreme Court. The standard for civil liability under EMTALA's patient screening requirements should be identical from state to state.

The New Mexico Court of Appeals, in the decision for which review is sought, held: "Plaintiffs' proof of the existence of a standard screening procedure for a person presenting a medical condition and of a deviation from that standard screening procedure with respect to that

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[2] The United States Supreme Court has recognized that there is a conflict regarding interpretation of § 1395dd(a). *Roberts*, 525 U.S. at 253 n.1. There is a paramount need for Supreme Court clarification and direction on the standard for civil liability in the context of emergency room screening claims under § 1395dd(a). Of the 286 published and unpublished opinions referencing EMTALA in Westlaw's ALLFEDS database, 64% involve EMTALA screening and reference § 1395dd(a).

person is a *prima facie* showing of inappropriate medical screening under the Emergency Act [EMTALA]." *Godwin v. Memorial Medical Center*, 25 P.3d 273, 276, 130 N.M. 434 (N.M. Ct. App. 2001) *cert. granted*, 26 P.3d 103, 130 N.M. 459 (N.M. 2001) (TABLE No. 26,922), *cert. quashed*, 46 P.3d 100 (N.M. Apr. 26, 2002) (TABLE, No. 26,919, 26,922).

By contrast, the First Circuit has held that deviation from a written policy regarding the taking of medical histories from patients is *not* sufficient to show a violation of § 1395dd(a). *Reynolds v. Maine General Health*, 218 F.3d 78, 83-84 (1st Cir. 2000). The standard adopted by the First Circuit is: "to recover for disparate treatment, appellants must proffer evidence sufficient to support a finding that [the decedent] received materially different screening than that provided to others in his condition." *Reynolds*, 218 F.3d at 84. The First Circuit rejects the position that deviation from a written hospital policy establishes a violation of EMTALA because it would bring a malpractice standard into the interpretation and application of a statute designed to complement and not incorporate state malpractice law. *Reynolds*, 218 F.3d at 84. The court explained, "It is not enough to proffer expert testimony as to what treatment *should* have been provided to a patient in [decedent's] condition." *Id.*

The Eighth Circuit takes the same position as the First Circuit, a position contrary to the New Mexico Court of Appeals. The Eighth Circuit rejects the argument that an EMTALA violation is stated when the plaintiff shows that he was treated differently from the treatment prescribed by the hospital's normal screening process. *Summers v. Baptist Medical Center Arkadelphia*, 91 F.3d 1132, 1138 (8th Cir. 1996). Also in contrast to the New Mexico

Court of Appeals, the Eighth Circuit held: "instances of 'dumping,' or improper screening of patients for a discriminatory reason, or failure to screen at all, or screening a patient differently from other patients *perceived* to have the same condition, all are actionable under EMTALA. But instances of negligence in the screening or diagnostic process, or of mere faulty screening, are not." *Summers*, 91 F.3d at 1139 (emphasis added). By using the term "perceived," Eighth Circuit injects a subjective component into the standard not present in the New Mexico Court of Appeals' decision.

As did the Eighth Circuit, the Fourth Circuit has adopted the following standard for determining whether there is a violation of the screening provision of EMTALA. "EMTALA is implicated only when individuals who are *perceived* to have the same medical condition receive disparate treatment; it is not implicated whenever individuals who turn out *in fact* to have had the same condition receive disparate treatment." *Vickers v. Nash General Hospital, Inc.*, 78 F.3d 139, 144 (4th Cir. 1996) (emphasis in original). Again, the term "perceived" allows for differences in medical opinion when analyzing the appropriateness of the screening.

In obvious contradiction with the other Circuits and the New Mexico Court of Appeals is the Sixth Circuit. This circuit holds that the term "appropriate" as used in § 1395dd(a) of EMTALA refers to the motives of the hospital. In the Sixth Circuit, a hospital satisfies § 1395dd(a) if it provides the same screening to patients paying for services received. *Cleland v. Bronson Health Care Group, Inc.*, 917 F.2d 266, 272 (6th Cir. 1990). The United States Supreme Court has read this language as requiring proof of "improper motive," and has recognized

the conflict with the other Circuits. *Roberts v. Galen*, 525 U.S. at 252, 253 n.1.

The Eleventh Circuit has interpreted the EMTALA screening provision as requiring a hospital to apply the same screening procedures to indigent patients which it applies to paying patients. *Holcomb v. Monahan, M.D.*, 30 F.3d 116, 117 (11th Cir. 1994). Unlike the New Mexico Court of Appeals, the Eleventh Circuit specifically requires a hospital to treat its paying patients the same as its indigent patients which suggests that some evidence about how the two classes of patients are treated would be necessary to prove an EMTALA violation.

The Fifth, Ninth, Tenth and District of Columbia Circuits all appear to be in accord with New Mexico, but in conflict with the First, Fourth, Sixth, Eighth and Eleventh Circuits. The Fifth Circuit has held that evidence that a hospital did not follow its own screening procedures can support a finding of EMTALA liability for disparate treatment. *Battle v. Memorial Hospital at Gulfport*, 228 F.3d 544, 558 (5th Cir. 2000), citing *Repp v. Anadarko Mun. Hosp.*, 43 F.3d 519 (10th Cir. 1994). The Fifth Circuit's standard for determining a violation of § 1395dd(a) is: "A hospital's liability under EMTALA is not based on whether the physician misdiagnosed the medical condition or failed to adhere to the appropriate standard of care. Instead, the plaintiff must show that the hospital treated him differently from other patients with similar symptoms." *Battle*, 228 F.3d at 557 (citation omitted).

The Ninth Circuit, has held: "[e]vidence that a hospital did not follow its own screening procedures can support a finding of EMTALA liability for disparate treatment." *Baker v. Adventist Health, Inc.*, 260 F.3d 987, 994 (9th Cir.

2001), citing *Battle v. Memorial Hospital at Gulfport*, 228 F.3d 554, 558 (5th Cir. 2000). The Ninth Circuit has also held:

> [A] screening is "appropriate" within the meaning of EMTALA if it: provides a patient with an examination comparable to the one offered to other patients presenting similar symptoms, unless the examination is so cursory that it is not designed to identify acute and severe symptoms that alert the physician of the need for immediate medical attention to prevent serious bodily injury.

Baker, 260 F.3d at 995 (citations omitted).

The Tenth Circuit has addressed what is appropriate medical screening under EMTALA and has held, "a hospital's obligation under EMTALA is measured by whether it treats every patient perceived to have the same medical condition in the same manner. 'Disparate treatment' is simply another term for describing or measuring a hospital's duty to abide by its established procedures." *Phillips v. Hillcrest Medical Center*, 244 F.3d 790, 797 (10th Cir. 2001). In a similar vein, the United States Court of Appeals, District of Columbia Circuit, has held, "a hospital fulfills the 'appropriate medical screening' requirement when it conforms in its treatment of a particular patient to its standard screening procedures. By the same token, any departure from standard screening procedures constitutes inappropriate screening in violation of the Emergency Act [EMTALA]." *Gatewood v. Washington Healthcare Corporation*, 933 F.2d 1037, 1041 (D.C. Cir. 1991).

The split among the circuits should be resolved and the United States Supreme Court should adopt a standard for determining whether a patient has received "appropriate

medical screening" that allows for variations in the exercise of medical judgment by emergency department personnel. Thus, if a patient is not perceived to have an emergency medical condition after an examination is performed, even if that perception is erroneous, EMTALA should not be implicated. Screening protocol which implicates medical judgment should be the arena of state malpractice and not supportive of liability under EMTALA. If a standard screening procedure is not followed because of an error of medical judgment, EMTALA should not be implicated. To hold otherwise allows the federal statute to encroach upon the traditional state torts of negligence and medical malpractice.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE NEW MEXICO COURT OF APPEALS AND TWO OF THE UNITED STATES COURTS OF APPEALS ON WHETHER EMTALA's SCREENING REQUIREMENT APPLIES WHEN NEW SYMPTOMS OR MEDICAL CONDITIONS DEVELOP WHILE THE PATIENT IS BEING TREATED IN THE EMERGENCY DEPARTMENT.

The New Mexico Court of Appeals' opinion recited the following facts in the background section: "Dr. Boyd testified that upon *initial* examination Godwin complained of diffuse neck and back pain and, upon his orders, nurses injected Godwin with an anti-pain medication. At some point, Godwin complained to Dr. Boyd about leg weakness and numbness." *Godwin*, 25 P.3d at 277 (emphasis added). In its discussion section, the New Mexico Court of Appeals' opinion reads: "Dr. Boyd acknowledged that Godwin's weakness in his legs was a significant development from

his *initial* evaluation that day." *Godwin*, 25 P.3d at 285 (emphasis added).

Despite acknowledging that the facts showed an initial screening and a later evaluation of new symptoms by Dr. Boyd, the New Mexico Court of Appeals failed to recognize this distinction in its analysis of whether Mr. Godwin had been provided with an "appropriate medical screening" under § 1395dd(a). This is in conflict with the First Circuit Court of Appeals which rejected the argument that a hospital's duty to provide appropriate screening arises each time the patient develops new symptoms or medical conditions while still in the emergency department. *Reynolds*, 218 F.3d at 82-83.

By failing to recognize the distinction under the EMTALA screening requirement between initial screening and later evaluation of new symptoms, the New Mexico Court of Appeals is also in conflict with the Fourth Circuit Court of Appeals which has held that there is a distinction between the "initial screening examination" which is the focus of EMTALA and the correctness of the treatment that follows from the screening. *Vickers*, 78 F.3d at 143.

The United States Supreme Court should resolve this conflict between the New Mexico Court of Appeals and the First and Fourth Circuit Courts of Appeals by addressing whether EMTALA's screening requirement continues to apply during the patient's entire course of treatment in the emergency department or whether the screening requirement applies only to the initial screening received upon arrival at the emergency room. In the case of Mr. Godwin, he arrived with one set of symptoms for which he received an initial screening assessment. Then, while still at the emergency department, new symptoms developed for

which he was assessed again. The hospital should satisfy its EMTALA screening obligations by providing an appropriate medical screening initially and EMTALA obligations should not arise with each new symptom experienced by the patient. 131 Cong. Rec. S13904 (daily ed. Oct. 23, 1985) (statement of Sen. Dole) (EMTALA designed to assure an adequate first response). This is an important question of federal law that should be resolved.

III. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE NEW MEXICO COURT OF APPEALS AND TWO OF THE CIRCUIT COURTS OF APPEALS ON WHETHER A SIMPLE NOTICE REQUIREMENT IN STATE LAW IS PREEMPTED BY EMTALA's TWO YEAR STATUTE OF LIMITATIONS.

EMTALA allows a person who has suffered personal harm as a direct result of a hospital's violation of EMTALA to sue for those damages available under the law of the state in which the hospital is located. 42 U.S.C. § 1395dd(d)(2)(A). Suit must be brought within two years of the violation. 42 U.S.C. § 1395dd(d)(2)(c). EMTALA also contains a preemption clause which provides: "The provisions of this section do not preempt any state or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section." 42 U.S.C. § 1395dd(f).

New Mexico has enacted the NMTCA, N.M. Stat. Ann. §§ 41-4-1 to 41-4-29 (Michie 1976), which grants immunity to governmental entities and public employees while acting within the scope of duty. N.M. Stat. Ann. § 41-4-4

(Michie 1976). The NMTCA also sets forth exceptions to this grant of immunity including liability for damages resulting from bodily injury caused by the negligence of public employees while acting within the scope of their duties in the operation of a hospital. N.M. Stat. Ann. § 41-4-9 (Michie 1976). Under the NMTCA, before a person can bring suit against a governmental entity for which immunity has been waived, that person must give notice to the governmental entity of his or her claim within ninety days after the occurrence giving rise to the claim. N.M. Stat. Ann. § 41-4-16 (Michie 1976). The notice provision of the NMTCA is best characterized as a simple notice requirement: it operates independent from and does not toll any limitations periods. MMC, at all times relevant, was a governmental entity covered by the NMTCA. Mr. Godwin failed to give written notice of his claim within ninety days as required by the NMTCA.

The New Mexico Court of Appeals held that the NMTCA's notice-of-claim requirement directly conflicted with EMTALA and was, therefore, preempted by EMTALA. *Godwin*, 130 N.M. at 443, 25 P.3d at 282. The New Mexico Court of Appeals' decision is in direct conflict with the Second and the Ninth Circuit Courts of Appeals' preemption analysis of New York and Oregon's simple notice provisions.

The Second Circuit has held that a notice-of-claim requirement in a New York statute that was a precondition to suing a municipality for personal injury was *not* preempted by EMTALA. *Hardy v. New York City Health Hospitals Corp.*, 164 F.3d 789, 795 (2nd Cir. 1999). *Hardy* is based on the following well-reasoned analysis: "New York's notice-of-claim law does not thwart EMTALA's purpose. Instead [it] 'simply addresses a concern that

[EMTALA] does not, namely the historical concern of governmental bodies that they be given reasonably prompt notice of tort claims against them.' [citation]. . . . EMTALA contains an express provision defining its limited preemptive reach: unless a state requirement directly conflicts with an EMTALA requirement, the state requirement is not preempted. [citation] This demonstrates that one of Congress's objectives was that EMTALA would peacefully coexist with applicable state 'requirements.'" *Id.*

The Ninth Circuit has held that Oregon's one year tort claim notice requirement, which provides that notice of a claim against a public body in a wrongful death action must be filed within one year of the alleged loss, was *not* preempted by EMTALA. *Draper v. Chapuzio, M.D.*, 9 F.3d 1391, 1394 (9th Cir. 1993).

The notice issue directly implicates preemption analysis. Preemption analysis directly implicates federalism and the relative power of the states vis-a-vis the federal government. The Federal Second and Ninth Circuits, in addressing this issue, have accorded deference to the states and indicate that EMTALA does not preempt state notice of claim requirements. The New Mexico Court of Appeals, however, is bent on strengthening the breadth of the federal legislation in the face of federal appellate decisions to the contrary. Preemption analysis implicates enormous public policy concerns and provides further support for the United States Supreme Court to grant the Writ of Certiorari.

CONCLUSION

The United States Supreme Court should accept Certiorari and review the decision of the New Mexico Court of Appeals below because: (1) there is a need to end the

circuit split on the appropriate analysis of emergency room screening claims under § 1395dd(a); (2) the New Mexico opinion clashes with circuit decisions concerning the requirement that § 1395dd(a) claims are limited to the initial screening and (3) the decision's discussion on preemption analysis is inconsistent with the only two circuits that have addressed whether EMTALA preempts a lower state's simple notice of suit requirement. In interpreting EMTALA screening claims in an unnecessarily broad manner, the New Mexico Court of Appeals invades the state's common law right to determine the sphere of medical negligence liability. In finding that EMTALA preempts New Mexico's notice requirement, the Court of Appeals weakens the breadth of defenses available to governmental entities under state legislation. The United States Supreme Court should accept certiorari to address the distinct circuit splits inherent in the issues presented for review. The United States Supreme Court should further accept review to (1) restore civil EMTALA claims to a limited remedy which does not invade the province of state malpractice law, and (2) to develop decisional law on EMTALA which recognizes that the intent of this statute is peaceable coexistent with state requirements, such as New Mexico simple notice provision. For all of the foregoing reasons, MMC respectfully requests this Honorable Court grant the Petition for Writ of Certiorari.

Respectfully Submitted,

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APPENDIX A

25 P.3d 273

Court of Appeals of New Mexico.

Melvin GODWIN and Connie Godwin,
Plaintiffs-Appellants/Cross-Appellees,

v.

MEMORIAL MEDICAL CENTER,
Defendant-Appellee/Cross-Appellant.

Nos. 20,175, 20,189.

April 5, 2001.
Certiorari Granted, No. 26,919, June 4, 2001.

Victor F. Poulos, The Law Office of Victor F. Poulos, P.C., John J. Grost, El Paso, TX, Shannon L. Donahue, Shannon L. Donahue, P.C., Albuquerque, NM, for Appellants.

Thomas A. Sandenaw, Jr., Leonard J. Piazza, Sandenaw, Carrillo & Piazza, P.C., Las Cruces, NM, for Appellee.

OPINION

SUTIN, Judge.

We are asked to address first impression issues regarding the applicability of our New Mexico Tort Claims Act (Tort Claims Act) in an action for damages under the federal Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (1994) (Emergency Act or EMTALA). The Emergency Act proscribes what is commonly referred to as "dumping" of emergency room patients by hospitals.

On motions for summary judgment, the district court held that the Tort Claims Act notice-of-claim and damages-cap provisions were applicable to the Emergency Act claim. However, the court determined that genuine issues of material fact existed regarding the notice-of-claim bar and liability under the Emergency Act. The issues are before us on interlocutory appeal. We hold (1) the Tort Claims Act's notice-of-claim requirement is preempted by the Emergency Act, (2) the Tort Claims Act limits the damages available under the Emergency Act by placing a "cap" on damages recoverable under the act from a public hospital, and (3) Plaintiffs' proof of the existence of a standard screening procedure for a person presenting a medical condition and of a deviation from that standard screening procedure with respect to that person is a prima facie showing of inappropriate medical screening under the Emergency Act.

THE PARTIES

This appeal involves the claims of Melvin Godwin against Memorial Medical Center alleging inappropriate medical screening and wrongful discharge from the Memorial emergency room by an emergency room physician, Dr. Martin Boyd, in violation of the Emergency Act. At the time suit was filed, Memorial was subject to the requirements of the Emergency Act because it received federal funding from Medicare. *See* §§ 1395dd(e)(2) and 1395cc. Memorial was also a government entity as defined in the New Mexico Tort Claims Act. *See* NMSA 1978, §§ 41-4-3(B), (C), and (H) (1995) and -4(A) and (B) (1996).

Dr. Boyd was not an employee of Memorial. He was an employee of Emergency Health Services Associates of New

Mexico (Health Services), an independent entity under contract with Memorial to provide physicians to staff Memorial's emergency room. Dr. Boyd's employment status is a significant factor in deciding issues involving the applicability of the Tort Claims Act to Godwin's Emergency Act claims. Because Dr. Boyd was an employee of Health Services, and not Memorial, Memorial is immune from liability under the Tort Claims Act. *See* §§ 41-4-4(D)(1) and (F); *see also Saiz v. Belen Sch. Dist.,* 113 N.M. 387, 402 n. 14, 827 P.2d 102, 117 n. 14 (1992) (holding that the Legislature retained immunity of state entities and local public bodies for the tortious acts of independent contractors committed within the scope of their duties); *Armijo v. Dep't of Health & Env't,* 108 N.M. 616, 619, 775 P.2d 1333, 1336 (Ct.App.1989). Yet Memorial is sued under the Emergency Act, and therein lies the primary legal conflict in this appeal.

Both Dr. Boyd and Health Services were sued by Godwin for medical negligence, but neither Dr. Boyd nor Health Services nor the medical negligence claims are involved in this appeal.

BACKGROUND

I. The Facts

On August 15, 1994, Godwin fell against a church pew causing pain in his back, and he went to Memorial's emergency room where he was examined, evaluated, and discharged by Dr. Boyd. Godwin did not have health insurance.

Still suffering from back pain on August 23, 1994, Godwin returned to Memorial's emergency room where a triage nurse noted his complaints and took his vital signs.

A second nurse then became the primary nurse in charge of his case, assisted by a third. Dr. Boyd testified that upon initial examination Godwin complained of diffuse neck and back pain and, upon his orders, nurses injected Godwin with an anti-pain medication.

At some point, Godwin complained to Dr. Boyd about leg weakness and numbness. Godwin testified that he told Dr. Boyd that his back was "killing" him, that his legs were getting weak, that his legs were numb, and that Dr. Boyd knew his feet and legs were numb. Dr. Boyd testified that, at the time he was first preparing to discharge Godwin, Godwin said he was having trouble moving his leg. As a result, Dr. Boyd reevaluated Godwin and ordered a CT scan of his lumbosacral spine. Dr. Boyd had eliminated the neck as a cause of the weakness based on prior negative cervical spine x-rays and the fact that weakness was limited to one leg.

Though the CT scan was negative, Dr. Boyd remained concerned because Godwin's clinical symptoms had not abated and he "didn't know what was going on." Dr. Boyd discharged Godwin, with diagnoses of "weakness to right leg, etiology unclear," and "back pain, musculoskeletal." He wrote instructions for Godwin: "Ibuprofen, as prescribed; neurology appointment ASAP; local heat, four times a day; return if further problem."

The discharge nurse testified she gave Godwin follow-up instructions related to low back pain and a direction to make an appointment with a neurologist. Godwin testified that after the nurse was gone, he spoke only with Dr. Boyd, who, "after everything was said and done and over with . . . walked by the door of the examining room and said, 'you need to see a neurologist ASAP.'" Further,

Godwin testified that Dr. Boyd did not talk to him about what the instructions entailed but said he was changing Godwin's pain medication and that he should "go home and stay in bed a couple of days and if it didn't get better, to come back."

Godwin left the emergency room in a wheelchair. According to Godwin, he was unable to move his legs. Godwin assumed that his leg condition resulted from the pain shots and would subside. He testified he "didn't know what a neurologist was" and that he did not think that seeing a neurologist was important.

Two days later, on August 25, 1994, Godwin again returned to Memorial, complaining of back pain and numbness in his legs. An MRI of his thoracic spine revealed compression of his spinal cord by a subdural hematoma, which was removed during an operation at a hospital in El Paso, Texas. Godwin now suffers from permanent paralysis of his lower extremities. Mr. and Mrs. Godwin gave their notice of claim against Memorial by certified letter dated December 20, 1994.

In April 1996, the Godwins filed a complaint for medical negligence against Dr. Boyd and Health Services. In August 1996, the Godwins amended their complaint to add Memorial as a defendant and to seek damages against Memorial based on theories of agency and violation of the Emergency Act.

In April 1998, the court dismissed Mrs. Godwin's "common law hospital claim" against Memorial, expressly finding that "she did not provide timely notice of a tort claim within 90 days of the occurrence, as required by" NMSA 1978, § 41-4-16 (1977) of the Tort Claims Act. The court also found that the Emergency Act "does not preempt

the application of New Mexico's statutory notice period to civil claims brought pursuant to [§]1395dd."

In July 1998, the Godwins filed a second amended complaint adding a respondeat superior-vicarious liability claim against Memorial. The court ruled that its previous order dismissing certain claims of Mrs. Godwin applied to the claims in her second amended complaint. The vicarious liability claims against Memorial were later dismissed leaving, against Memorial, only Mr. Godwin's Emergency Act claim.

Memorial asserted that Godwin's Emergency Act claim was subject to the 90-day notice-of-claim requirement and the damages cap in the Tort Claims Act. Godwin sought summary judgment in his favor on the ground that because Dr. Boyd was not a public employee, and Memorial was thereby immune from liability under the Tort Claims Act, the Tort Claims Act was completely inapplicable. Memorial filed motions for summary judgment on the grounds that Godwin could not overcome his failure to file a timely Tort Claims Act notice of claim, and that even were Godwin to do so, he could not as a matter of law prove a violation of the Emergency Act. The district court denied the motions, leaving to be tried the issues whether Godwin satisfied the Tort Claims Act notice-of-claim requirement and, if so, whether Memorial violated the Emergency Act.

II. The Emergency Act

A. Purpose

The Emergency Act was enacted to prevent hospitals from refusing to treat patients who do not have health insurance or are otherwise unable to pay for services. *See*

Draper v. Chiapuzio, 9 F.3d 1391, 1393 (9th Cir. 1993); *Delaney v. Cade,* 986 F.2d 387, 391 n. 5 (10th Cir. 1993). Its anti-dumping thrust was "to provide an 'adequate first response to a medical crisis' for all patients and 'send a clear signal to the hospital community . . . that all Americans, regardless of wealth or status, should know that a hospital will provide what services it can when they are truly in physical distress.'" *Baber v. Hosp. Corp. of Am.,* 977 F.2d 872, 880 (4th Cir. 1992) (quoting 131 Cong. Rec. S13904 (Oct. 23, 1985) (statement of Sen. Durenberger)).

The Emergency Act creates "a new, federal cause of action" involving "'resolution of a substantial question of federal law'" and "creat [ing] liability for a refusal to treat, which state malpractice law does not." *Thornton v. Southwest Detroit Hosp.,* 895 F.2d 1131, 1133 (6th Cir. 1990) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 27-28, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)).

"[E]nacted to fill a lacuna in traditional state tort law by imposing on hospitals a legal duty (that the common law did not recognize) to provide emergency care to all," the Emergency Act expresses Congress's intent "to supplement, but not supplant, state tort law." *Hardy v. New York City Health & Hosps. Corp.,* 164 F.3d 789, 792-93 (2d Cir. 1999). It incorporates neither a negligence nor a medical malpractice standard in determining liability, *see Baber,* 977 F.2d at 880. Courts have stated that this Act imposes a strict liability on a hospital which violates its requirements. *See, e.g., Repp v. Anadarko Mun. Hosp.,* 43 F.3d 519, 522 n. 5 (10th Cir. 1994) (quoting *Abercrombie v. Osteopathic Hosp. Founders Ass'n,* 950 F.2d 676, 681 (10th Cir. 1991)). The Emergency Act "is not a substitute for state law malpractice actions, and was not intended to

guarantee proper diagnosis or to provide a federal remedy for misdiagnosis or medical negligence." *Power v. Arlington Hosp. Ass'n,* 42 F.3d 851, 856 (4th Cir. 1994).

B. Application

The Emergency Act applies to all hospitals receiving federal funding from Medicare which operate an emergency care department. *See* §§ 1395dd(e)(2) and 1395cc. Section 1395dd(a) of the Emergency Act requires hospitals with emergency departments to provide an "appropriate medical screening examination within the capability of the hospital's emergency department" to any individual who comes to the emergency department and requests examination or treatment of a medical condition. Sections 1395dd(b) (1)(A) and (B) require the hospital, within its available staff and facilities, with respect to any individual determined to have an emergency medical condition, to provide for "such further medical examination and such treatment as may be required to stabilize the medical condition" or "for transfer of the individual to another medical facility." "Transfer" includes discharge. § 1395dd(e)(4).

The Emergency Act's right of action permits recovery in damages due to inappropriate screening (§ 1395dd(a)) or failure to stabilize an emergency condition before transfer or discharge (§ 1395dd(b)(1)(A) and (B)). *See* § 1395dd(d)(2)(A). An injured party is entitled to "obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate." *Id.* The Emergency Act contains a limitations-on-actions clause: "No action may be brought under this paragraph more than two years after

the date of the violation with respect to which the action is brought." § 1395dd(d)(2)(C). The Emergency Act also contains a preemption clause. *See* § 1395dd(f).

III. Issues Certified to This Court

The district court certified the following issues to this Court for interlocutory review:

> 1. Does the Tort Claims Act (NMSA 1978, § 41-4-1 to § 41-4-29 (1976, as amended through 1999)), in particular its notice-of-claim and damages-cap provisions, apply to this Emergency Act action? And whether, if the notice-of-claim provision applies, a fact issue exists on either incapacity or estoppel sufficient to withstand an adverse summary judgment on this issue.
>
> 2. Does Godwin's claim of inappropriate screening under Emergency Act § 1395dd(a) require a showing of disparate treatment and, if so, did Godwin submit sufficient facts to withstand an adverse summary judgment on this issue?
>
> 3. Does Godwin's claim of discharge without proper stabilization of his emergency condition under Emergency Act § 1395dd(b) require a showing of actual knowledge by Memorial of the condition and, if so, did Godwin submit sufficient facts to withstand an adverse summary judgment on this issue?

DISCUSSION

I. Standard of Review

We review de novo the applicability of the Tort Claims Act. *See In re Estate of Armijo,* 2000-NMCA-008, ¶ 5, 128

N.M. 565, 995 P.2d 487 (holding that construction of a statute is a matter of law). Summary judgment is proper if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *See Powell v. New Mexico Highway & Transp. Dep't,* 117 N.M. 415, 417, 872 P.2d 388, 390 (Ct.App.1994).

II. Applicability of the Tort Claims Act

The issues certified to us by the district court cannot be adequately addressed without our first looking at the general applicability of the Tort Claims Act. We must keep our eyes on the language in the Emergency Act creating the private cause of action. Section 1395dd(d)(2)(A) of the Emergency Act reads:

> Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, *obtain those damages available for personal injury under the law of the State in which the hospital is located,* and such equitable relief as is appropriate.

(Emphasis added.)

We must also keep in view the Emergency Act's § 1395dd(f) preemption clause:

> The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section.

It is important to note at the outset that Congress did not mention protective-state statutory schemes granting

immunity to hospitals. We find nothing in the Emergency Act that indicates that a particular hospital that comes within that Act's reach is to be spared as to liability. Nor do we find anything in its sparse legislative history suggesting that state immunity statutes might bar Emergency Act relief. *See* H.R.Rep. No. 241, 99th Cong.2d Sess., Pt. 3 at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 42, 581, 605, 726; *Power,* 42 F.3d at 862 (noting that the legislative history is "sparse").

The language in § 1395dd(d)(2)(A), "damages available for personal injury under the law of the State," however, raises the issue whether state immunity statutes are incorporated in the Emergency Act. Were that language absent, there would be no language in the Emergency Act even suggesting that the Emergency Act incorporated state tort immunity law. We do not believe that Congress intended to incorporate state statutory immunity into the Emergency Act as a limitation on "damages available for personal injury" or otherwise. Memorial agrees with this.

Memorial nevertheless contends that the Tort Claims Act applies because Memorial is a government entity covered under the Tort Claims Act, and because the damages that Godwin seeks would be available in New Mexico, if at all, exclusively pursuant to the Tort Claims Act. Because the Tort Claims Act is the sole basis on which Godwin can seek any damages under New Mexico law, Memorial asserts, its provisions apply. *See Bird v. Pioneers Hosp.,* 121 F.Supp.2d 1321, 1323 (D.Colo.2000) (holding the Colorado Governmental Immunity Act applicable to Emergency Act claims in considering whether the state notice requirement conflicted with the Emergency Act's statute of limitations).

While acknowledging that the Tort Claims Act "ordinarily would be the applicable statute," Godwin contends that the Tort Claims Act does not apply precisely because Memorial is immune from liability under the Tort Claims Act due to Dr. Boyd's status as a private employee of Health Services. According to Godwin, the Tort Claims Act simply never comes into play. The Emergency Act, not the Tort Claims Act, provides the cause of action against Memorial. In addition, Godwin asserts that the preemption clause in the Emergency Act prohibits the application of the notice-of-claim and damages-cap provisions of the Tort Claims Act. Godwin argues that, just as Memorial's immunity under the Tort Claims Act cannot trump the Emergency Act, provisions of the Tort Claims Act such as the notice-of-claim and the damages-cap provisions cannot apply to limit or bar an Emergency Act claim.

Under New Mexico law, the Tort Claims Act would be a hurdle to recovery of damages by Godwin for personal injury against Memorial. *See* § 41-4-2(A). Godwin cannot state a claim for relief against Memorial under the Tort Claims Act because Memorial is immune from liability under the Tort Claims Act. Yet to assert this immunity bar and thus the unavailability of any damages as a defense to Godwin's Emergency Act claim is to attack the heart and soul of the Emergency Act – little more could defeat the purpose of the Emergency Act. *See Helton v. Phelps County Regional Med. Ctr.,* 817 F.Supp. 789, 791-92 (E.D.Mo.1993) (holding state law granting sovereign immunity to a hospital in direct conflict with and preempted by Emergency Act).

Looking, then, to the notice-of-claim and damages-cap provisions themselves, we examine whether they should

be applied to bar (notice of claim) Godwin's Emergency Act claim or limit (damages cap) his damages recovery.

III. Applicability of the Tort Claims Act Notice-of-Claim Provision

The Tort Claims Act requires a tort victim to give a written notice of claim within 90 days after an occurrence giving rise to the claim as a condition precedent to an action under that Act. *See* NMSA 1978, § 41-4-16(A) and (B) (1977). This notice-of-claim requirement operates as a statutory limitations period and failure to file a timely notice of claim is a statutory bar to suit. *See Marrujo v. New Mexico Highway Transportation Dep't,* 118 N.M. 753, 758, 887 P.2d 747, 752 (1994); *Ferguson v. New Mexico State Highway Comm'n,* 99 N.M. 194, 197, 656 P.2d 244, 247 (1982). It is undisputed that Godwin failed to give a written notice of claim within the 90-day period.

Godwin's primary attack is twofold. He argues that the notice-of-claim requirement is a procedural limitation the likes of which Congress had no intention of incorporating into the Emergency Act through § 1395dd(d)(2)(A) or otherwise. He also argues that the requirement is preempted by the Emergency Act's two-year statute of limitations contained in § 1395dd(d)(2)(C). Godwin asserts that the Emergency Act's clear purpose is to allow victims of Emergency Act violations to vindicate a federal right, and that to permit the notice-of-claim bar would directly conflict with that purpose. He supports these arguments with several federal and state cases in which the courts have determined that state pre-conditions to suit are not incorporated in or are preempted by the Emergency Act. *See Power,* 42 F.3d at 865-66; *Reid v. Indianapolis Osteopathic Med. Hosp., Inc.,* 709 F.Supp. 853, 855-56

(S.D.Ind.1989); *Cooper v. Gulf Breeze Hosp., Inc.*, 839 F.Supp. 1538, 1543 (N.D.Fla.1993), *aff'd*, 82 F.3d 429 (11th Cir. 1996); *HCA Health Servs. v. Gregory*, 596 N.E.2d 974, 977 (Ind.Ct.App.1992); *Parrish v. Brooks*, 856 S.W.2d 522, 526 (Tex.Ct.App.1993); *Smith v. Richmond Memorial Hosp.*, 243 Va. 445, 416 S.E.2d 689, 694-95 (1992). These cases primarily involve a state pre-suit administrative medical panel review requirement, often in company with a requirement of notice to the health care provider.

Memorial relies for the most part on two federal cases that, Memorial contends, are more in point because they involve "simple notice statutes" like that in the Tort Claims Act, that is, simply a notice of claim requirement without an accompanying pre-suit medical panel review or other exhaustion or tolling requirement. *See Draper*, 9 F.3d at 1393, and *Hardy*, 164 F.3d at 792. Memorial explains that compliance with the 90-day notice requirement constitutes no obstacle to filing an Emergency Act action within two years – an Emergency Act victim can comply with the notice requirement and also meet the Emergency Act's two year limitation. Therefore, Memorial contends, there exists no direct conflict and, thus, no preemption. Memorial argues that *Hardy* and *Draper* are dispositive, and not those cases cited by Godwin which do not involve a "simple notice statute." Those cases, Memorial asserts, involve an exhaustion requirement, namely either alone or in tandem with a notice requirement that might cause a victim of an Emergency Act violation to miss the Emergency Act's two-year deadline.

As additional support for his position, Godwin relies on *Felder v. Casey*, 487 U.S. 131, 153, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988), which holds, under "[p]rinciples of

federalism, as well as the Supremacy Clause," a state notice-of-claim requirement preempted with respect to a civil rights claim under 42 U.S.C. § 1983 brought in state court because it was "inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law." *Felder,* 487 U.S. at 153, 108 S.Ct. 2302. Memorial argues that *Felder* is distinguishable for the reasons elaborated in *Hardy,* 164 F.3d at 795, including the fact that § 1983 contains no preemption clause, and that the core purposes of § 1983 and the Emergency Act are different.

Three Emergency Act provisions come into play. First is § 1395dd(d)(2)(A), creating a federal cause of action. That section specifically incorporates state law by permitting recovery of those damages available for personal injury under the law of the state in which the hospital is located. Second is § 1395dd(d)(2)(C), the Act's own statute of limitations. That section expressly gives the victim two years from the date of violation of the Emergency Act within which to file an Emergency Act claim. Third is § 1395dd(f), the Act's specific preemption clause. That clause says that the Emergency Act provisions "do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement" of the Emergency Act.

The Emergency Act creates a federal cause of action intentionally distinct from state malpractice causes of action. We therefore look to the Emergency Act for the parameters of duty. The Act's preemption clause defers to compatible state law. This deference presumably calls for the application of substantive state law on both proximate cause and damages. Yet the Act specifically incorporates the type and amount of damages available under state law

– rather than leaving that issue to a preemption analysis. Nowhere in the Emergency Act is there a specific indication whether state procedural limitations on liability or access to the court are to apply.

We are persuaded that the Tort Claims Act 90-day notice-of-claim requirement is preempted by the Emergency Act. Nothing in the Emergency Act or its legislative history suggests an intent that the liability of a hospital for damages can be completely eliminated by state law, whether that elimination is pursuant to a complete, unconditional substantive sovereign immunity provision based on a unique hospital status under state law (namely, that of governmental entity sovereign immunity) or a complete but conditional procedural bar based on a unique hospital status (namely, that of governmental entity immunity resulting from an untimely notice of claim). Nor is there a suggestion in the law or history that a victim of an Emergency Act violation must pass any procedural muster other than compliance with the Act's two-year statute of limitations before filing an action for relief. The fact of the matter is that if failure to give a 90-day notice bars an Emergency Act claim, the two-year period given is taken away. The two-year limitations period in effect is reduced to 90 days or less and effectively vitiated. These circumstances create a direct conflict between the Tort Claims Act notice-of-claim requirement and the Emergency Act's statute of limitations and purposes.

We hold that the Tort Claims Act notice-of-claim requirement is preempted by the Emergency Act and therefore not applicable to an Emergency Act claim.

IV. Applicability of The Tort Claims Act Damages-Cap Provision

Section 1395dd(d)(2)(A) of the Emergency Act allows recovery of "those damages available for personal injury under the law of the State in which the hospital is located." The Tort Claims Act expressly limits damages by placing a "cap" on damages recoverable under that act. *See* § 41-4-19.

Although they do not involve statutes granting immunity like our Tort Claims Act, the more persuasive federal and state authority supports the view that state damages-cap provisions apply to Emergency Act claims. *See, e.g., Power,* 42 F.3d at 860-65; *Feighery v. York Hosp.,* 38 F.Supp.2d 142, 158 (D.Maine 1999) (holding patient's widow's Emergency Act claim subject to damages cap in Maine's wrongful death statute); *Reid,* 709 F.Supp. at 855-56 (holding that an award under the Emergency Act was subject to Indiana's limitation on maximum amount recoverable from a healthcare provider); *Lee by Wetzel v. Alleghany Reg'l Hosp. Corp.,* 778 F.Supp. 900, 903-04 (W.D.Va.1991) (holding that Emergency Act incorporates Virginia's cap in medical malpractice actions); *Barris v. County of Los Angeles,* 20 Cal.4th 101, 83 Cal.Rptr.2d 145, 972 P.2d 966, 976 (1999) (damages awarded under Emergency Act subject to medical malpractice cap in California).

These courts found a congressional intent that recovery under the Emergency Act be based on the type and amount of personal injury damages available under the applicable state tort claim. *See Power,* 42 F.3d at 860; *Reid,* 709 F.Supp. at 855 (stating "[t]he legislative history . . . is completely silent on the question of whether the phrase 'those damages available for personal injury under

the law of the state' should be read as including state limitations on medical malpractice damages," and concluding that to read the Emergency Act to not include damages caps "would render the statute's incorporation clause effectively meaningless").

While that congressional intent appears to be based on a concern about recoveries against healthcare providers, *see Power,* 42 F.3d at 862 (discussing the House Committee on the Judiciary's concern with the potential impact of the Emergency Act's enforcement provisions on the current medical malpractice crisis); *Barris,* 83 Cal.Rptr.2d 145, 972 P.2d at 973 (stating that "the apparent intent of Congress was to balance the deterrence and compensatory goals of [the Emergency Act] with deference to the ability of states to determine what limits are appropriate in personal injury actions against health care providers"), we see no reason to cut away as inapplicable a state damages-cap provision that applies generally to government entities such as that contained in the Tort Claims Act.

Rather than directly conflict with the purposes of the Emergency Act, a state law limitation on damages is more reasonably read as being consistent with the words, "those damages available," in § 1395dd(d)(2)(A). *See Power,* 42 F.3d at 863-64 (finding it difficult to say that the cap " 'directly conflicts' with the goals of [the Emergency Act,]" and stating that "analyzing whether an [Emergency Act] claim would be deemed a [state] malpractice claim [with its applicable damages cap] . . . best effectuates Congress's direction that courts should look to state law to determine what damages are available in an [Emergency Act] action."). A "preemption analysis is inappropriate when, as

with § 1395dd(d)(2)(A), a federal statute expressly incorporates state law." *Id.* at 864.

We hold that the "damages available" under New Mexico law against this government hospital are those "damages available" under the Tort Claims Act.

V. The Emergency Act Issues of Appropriate Screening And Stabilization

A. Appropriate Medical Screening – § 1395dd(a)

Godwin contends that Memorial failed to appropriately screen him, in violation of § 1395dd(a), which reads:

> In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for *an appropriate medical screening examination* within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.

(Emphasis added). Whether a violation of § 1395dd(a) has occurred is normally a question of fact. *See Ruiz v. Kepler,* 832 F.Supp. 1444, 1446 (D.N.M.1993); *see also Griffith v. Mt. Carmel Med. Ctr.,* 831 F.Supp. 1532, 1543 (D.Kan.1993) (noting most courts treat issue of appropriate screening as a question for the trier of fact).

The purpose of the medical screening examination required by § 1395dd(a) is "to determine whether an 'emergency medical condition exists.' Nothing more, nothing less." *Collins v. DePaul Hosp.,* 963 F.2d 303, 306-07 (10th Cir. 1992); *see Griffith,* 831 F.Supp. at 1538 n. 4 ("At a minimum, the statutory language requires the hospital to give a screening to determine whether an emergency medical condition exists."). The goal "is to determine whether a patient with acute or severe symptoms has a life threatening or serious medical condition," and the hospital must "develop a screening procedure designed to identify such critical conditions that exist in symptomatic patients and to apply that screening procedure uniformly to all patients with similar complaints." *Baber,* 977 F.2d at 879.

The "'appropriateness' of the screening [is not to] be determined by its adequacy in identifying the patient's illness," *Holcomb v. Monahan,* 30 F.3d 116, 117 (11th Cir. 1994), or its accuracy in diagnosis, *see Vickers v. Nash Gen. Hosp., Inc.,* 78 F.3d 139, 143 (4th Cir. 1996). The screening is appropriate "[a]s long as a hospital applies the same screening procedures to indigent patients which it applies to paying patients." *Holcomb,* 30 F.3d at 117. It "is not judged by its proficiency in accurately diagnosing the patient's illness, but rather by whether it was performed equitably in comparison to other patients with similar symptoms." *Marshall v. East Carroll Parish Hosp. Serv. Dist.,* 134 F.3d 319, 322 (5th Cir. 1998).

1. Deviation From Standard Procedure

Memorial asserts that it was entitled to summary judgment on the issue of appropriate medical screening.

Memorial contends that, in order to prove his § 1395dd(a) claim, Godwin was required but failed to present evidence that it treated him differently in its screening process from other patients with similar conditions. Memorial cites cases from various jurisdictions that unequivocally state that a plaintiff suing under the Emergency Act must prove disparate treatment. *See, e.g., Marshall,* 134 F.3d at 323-24; *Vickers,* 78 F.3d at 143-44.

Further, Memorial argues that any deviation in its care of Godwin from its standard screening process was de minimis. De minimis deviations cannot support liability for disparate treatment under the Emergency Act. *See Repp,* 43 F.3d at 523.

Godwin asserts that the district court was correct in denying Memorial summary judgment. Godwin contends that he need show only a deviation as to him from a standard procedure. Godwin presented evidence that Memorial's standard procedure was to have a first level specialist in internal medicine or family practice on call. Sub-specialists were on a consultation-call schedule for the first level specialists. A neurologist was available to consult with the internist or family practice doctor (who had been consulted by the emergency room physician on duty). Thus, Godwin asserts, the emergency department staff at Memorial was capable of consulting a neurologist pursuant to its standard procedure.

Godwin also asserts that it was a standard procedure for the emergency room physician to conduct a basic neurological examination. He further asserts that it was Memorial's standard procedure for nurses to follow a specific spinal cord protocol to screen for potential spinal cord injuries.

Godwin contends that Memorial failed to follow its standard procedures and argues that these lapses raise a genuine issue of fact whether Memorial failed to provide an appropriate medical screening examination while he was in the hospital on August 23. He argues that Dr. Boyd knew that Godwin should see a neurologist, but did not initiate its procedure to obtain a neurological consultation. He further argues that Dr. Boyd failed to note anything in the medical records regarding a standard neurological examination. In addition, Godwin argues that no one in the emergency department initiated a spinal cord protocol.

Godwin also raises various other failures by Memorial, including the failures of nurses to give a neurological assessment and to mark the "neuro" section on the medical form. Further, he complains of the failure of the discharge nurse to assess or note the deterioration of his neurological condition which seemed apparent when he left the emergency room in a wheelchair.

As did the district court, Godwin relies on *Ruiz,* 832 F.Supp. at 1449, and *Repp,* 43 F.3d at 522, for the proposition that "a hospital defines which procedures are within its capabilities when it establishes a standard screening policy for patients entering the emergency room" and "violates section 1395dd(a) when it does not follow its own standard procedures." Looking to *Ruiz* and *Repp,* the district court determined that "[d]isparate treatment is not required."

Memorial contends that *Repp* and *Ruiz* are early, outdated authority that incorrectly interpret § 1395dd(a) to eliminate Godwin's burden to establish a prima facie case showing that Memorial actually treated him differently than other patients having similar medical conditions.

Memorial argues that not every neurological involvement requires a neurological consultation. It asserts that Godwin failed to present any evidence specifically showing that persons with a history and symptoms the same as his received a different screening procedure, or that the consultation procedure that Godwin asserts was a standard one was used for others who had the same type of back pain and numbness that Godwin had.

The distinction in the case law on the issue of disparate treatment appears to us to quietly center on the claimant's proof burden. *Compare Repp,* 43 F.3d at 522; *Ruiz,* 832 F.Supp. at 1447 n. 4; *Romo v. Union Mem'l Hosp., Inc.,* 878 F.Supp. 837, 841-42 (W.D.N.C.1995) (stating that "the fact that certain routine procedures . . . were allegedly not followed suggests disparate treatment and may prove to be evidence of an inappropriate screening under" the Emergency Act); *C.M. v. Tomball Reg'l Hosp.,* 961 S.W.2d 236, 241-42 (Tex.App.1997); *with Williams v. Birkeness,* 34 F.3d 695, 697 (8th Cir. 1994) (holding that "[t]o prevail on its summary judgment motion, the hospital was not required to disprove the Williamses' claim by showing all patients were treated the same").

Reading the "appropriate screening" cases together we do not see a hard division between deviation from a standard procedure and disparate treatment. We see rather linguistic confusion that is resolved by clarifying the proof burden. A plaintiff will rarely know of how patients that preceded him in the emergency room were treated. The plaintiff's Emergency Act action will likely be based only on knowledge of the existence of and deviation from a standard procedure. We do not think it required that, in order to survive a motion for summary judgment,

a plaintiff with a medical condition for which a standard screening procedure is in place must actually show that he was treated differently than other patients having the same or similar conditions.

In reducing the cases to their common denominator, we conclude that a plaintiff's proof of the existence of a standard screening procedure for a person presenting a medical condition, and of a deviation from that standard screening procedure with respect to that person, is a prima facie showing of inappropriate screening sufficient to defeat a motion for summary judgment. "[A] hospital fulfills the 'appropriate medical screening' requirement when it conforms in its treatment of a particular patient to its standard screening procedures." *Gatewood v. Washington Healthcare Corp.*, 933 F.2d 1037, 1041 (D.C.Cir. 1991) (holding that "any departure from standard screening procedures constitutes inappropriate screening in violation of the Emergency Act").

At trial, a plaintiff can attempt to solidify that showing with evidence obtained through discovery of actual cases in which that standard procedure was followed for other persons with similar medical conditions. The hospital as a defendant can present evidence that as to the plaintiff the screening procedure was followed, or that the plaintiff received the same treatment as other patients with similar medical conditions.

2. Result

The evidence that Dr. Boyd did not seek a neurological consultation through an on-call internist did raise a genuine issue of material fact as to appropriate medical screening and alone is sufficient to save Godwin from

summary judgment. Godwin presented evidence that would permit a jury to infer that a neurological consultation was part of Memorial's standard screening procedure. Dr. Boyd acknowledged that Godwin's weakness in his legs was a significant development from his initial evaluation that day. He also testified that he could have consulted with medical staff at the University of New Mexico or have ordered an MRI. The on-call Memorial internist, Dr. Holloman, testified that in his usual work routine, were he to be consulted by the emergency room physician regarding a patient with a neurological problem, and were he to determine that the patient had an unexplained weakness in an extremity, he would refer the patient to a neurologist.

Although there exists some question as to its application as part of a standard procedure to screen Godwin's condition, Godwin also presented evidence that a nurse's spinal cord protocol existed. He further showed that the development of weakness in a leg following trauma to the back must be considered an emergency; and that a neurological consultation was warranted on August 23, 1994. In addition, through the affidavit of Michael R. Swenson, MD, Professor and Chair of the Department of Neurology at the University of Louisville, Kentucky, Godwin showed that "the sudden onset of an acute neurological sign of leg weakness following trauma to the back must be considered an emergency and evaluated until a diagnosis is established or a suitable referral or consultation done on an emergency basis," that "[a]n adequate screening evaluation for a patient who develops leg weakness following trauma to the back would include a standard neurological physical examination, which is performed by the physician," that "[t]he emergency physician should have ordered

an MRI of the spinal cord to find or rule out a compressing lesion as part of the screening examination," and that "[t]he emergency physician should have made arrangements to have Mr. Godwin seen by a neurologist or neurosurgeon on an emergency basis since he was not able to make a definitive diagnosis as to the cause of the back pain and leg weakness." Another expert, George R. Schwartz, MD, an emergency physician, concurred with Swenson, adding that the August 23 screening was "not appropriate."

In the face of this evidence, Memorial contends that the process of deciding whether to obtain neurological consultation is not to be considered a part of the "appropriate screening procedure" contemplated under the Emergency Act, but it is rather a discretionary function based on a medical-on-the-spot judgment call that a physician must make in each individual case. Such judgment calls, Memorial contends, if negligently made, may constitute malpractice, but cannot constitute a failure to appropriately screen a patient under the Emergency Act. Even were it an issue of "appropriate medical screening," Memorial further contends, it is clear that, as a matter of law, Dr. Boyd acted appropriately and within the requirements of the Emergency Act by advising Godwin to see a neurologist as soon as possible.

It is true that, in regard to screening, liability must be based on "more than a mere misdiagnosis." *Griffith,* 831 F.Supp. at 1542; *see also Gatewood,* 933 F.2d at 1041 ("[Plaintiff's] allegations of misdiagnosis, without more, are . . . not cognizable . . . . Absent some allegation of differential treatment, no claim is stated under subsection 1395dd(a)."). A failure to examine or test pursuant to a standard screening procedure might support a medical

malpractice claim under State law and at the same time "also constitute evidence of differential treatment sufficient to support a claim for failure to give an 'appropriate medical screening' under [the Emergency Act]." *Griffith,* 831 F.Supp. at 1543.

That Dr. Boyd knew of neurological involvement but remained unaware of its etiology might implicate medical malpractice law. However, if Dr. Boyd diagnosed neurological involvement but failed to follow through with all facets of Memorial's standard procedure in addressing the neurological condition, the Emergency Act is implicated. *See, e.g., Scott v. Hutchinson Hosp.,* 959 F.Supp. 1351, 1357 (D.Kan.1997) (holding that in the absence of evidence that a hospital did not follow its standard screening procedure, summary judgment is proper as to an inappropriate screening claim); *see also Lane,* 846 F.Supp. at 1551 (holding that "if a hospital acts consistently with its standard screening procedures [it is not liable] even if those procedures are deficient under state medical malpractice law").

We cannot say as a matter of law that the failure to obtain a neurological consultation was a decision to be measured solely by a medical negligence standard and not pursuant to an appropriate medical screening standard. The spheres of medical malpractice and failure to provide an appropriate medical screening may overlap.

We agree with the district court that Godwin has presented sufficient evidence from which a jury could infer that failing to obtain a neurological consultation under the circumstances in this case was a violation of the appropriate screening examination requirement in § 1395dd(a). We are, therefore, not prepared to say that no genuine issue of

material fact exists as to whether Memorial failed to have and to apply an appropriate screening examination under the Emergency Act. *See Griffith,* 831 F.Supp. at 1540-43 (holding evidence presented sufficient to raise a question of fact as to whether screening was appropriate); *Romo,* 878 F.Supp. at 841 n. 1 (deciding that although evidence "is, at first glance, somewhat scant," and "apparently the only significant indicator of differential treatment . . . , it is apparently a very significant one" and denial of summary judgment was appropriate).

B. Stabilization of Emergency Condition – § 1395dd(b)

Godwin alleges that Memorial discharged him when his emergency condition was not properly stabilized, in violation of the Emergency Act. He asserts that this is an issue requiring jury determination. According to Godwin, §§ 1395dd(b)(1)(A) and (B) required Memorial to provide him either "such further medical examination and such treatment as may be required to stabilize the medical condition" before discharge, § 1395dd(b)(1)(A), or to transfer him to another medical facility in accordance with § 1395dd(c). *See* § 1395dd(b)(1)(B).

"To stabilize," with respect to an emergency medical condition, is

> to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer [or discharge] of the individual from a facility.

Section 1395dd(e)(3)(A); *see* § 1395dd(e)(4) ("Transfer" includes "discharge."). An emergency medical condition is

> a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in –
>
> (i) placing the health of the individual . . . in serious jeopardy,
>
> (ii) serious impairment to bodily functions, or
>
> (iii) serious dysfunction of any bodily organ or part.

Section 1395dd(e)(1)(A). Thus, in addition to the duty to provide an appropriate medical screening examination, the Emergency Act imposes a duty to stabilize an emergency medical condition before discharging the patient. *See, e.g., Collins,* 963 F.2d at 307-08. Simply stated, Memorial was required to provide such further medical examination and treatment as was required to medically treat an emergency medical condition.

Memorial asserts that it was entitled to summary judgment on this issue. Memorial contends that it cannot be liable under the Emergency Act for failing to stabilize unless it had *actual* knowledge of the existence of a specific emergency medical condition. Most cases on this issue support this position. *See, e.g., Marshall,* 134 F.3d at 325; *Brodersen v. Sioux Valley Mem'l Hosp.,* 902 F.Supp. 931, 944 (N.D.Iowa 1995); *Barris,* 83 Cal.Rptr.2d 145, 972 P.2d at 971-72. Godwin does not disagree.

There exists no dispute that on August 23, 1994, Godwin had a subdural hematoma and that this condition

constituted an emergency medical condition. However, no evidence establishes that Memorial had actual knowledge of that specific condition. Nevertheless, referring to the Emergency Act, Godwin contends that stabilization was required for what he contends was an emergency condition that was manifested through symptoms presented to the hospital whether or not the hospital was aware of the subdural hematoma. *See* § 1395dd(e)(1)(A) (defining an emergency medical condition as "a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in" serious impairment or dysfunction or health jeopardy).

The record reflects Memorial's actual knowledge that Godwin suffered a traumatic injury resulting in severe back pain with weakness and numbness in one of his legs of undiagnosed etiology, and also Memorial's actual knowledge that this was a condition that required the attention of a neurologist. Godwin argues that these circumstances constituted "an unstable emergency medical condition" sufficient for jury consideration. He concludes that "[r]ecognizing . . . whether a hospital knows a patient has an emergency medical condition" is a jury issue.

All this being said, as interesting and important as this issue may be, we fail to see how, in this case, the stabilization requirement in the Emergency Act is implicated. The stabilization requirement is "triggered" only when an emergency medical condition is detected in the screening process. *See* § 1395dd(a) and (b)(1). The stabilization provision does not apply unless it is first determined that an emergency medical condition exists. *See Urban v. King,* 43 F.3d 523, 525-26 (10th Cir. 1994); *Marshall,* 134 F.3d at 321. Godwin was discharged before

any emergency medical condition was diagnosed. We therefore never reach the stabilization issue.

CONCLUSION

We hold that Godwin's claim for violation of § 1395dd(a) (failure to provide an appropriate medical screening examination) is for jury determination. The Tort Claims Act's notice-of-claim bar does not apply to that claim. The Tort Claims Act's damages-cap provision does apply to that claim. We remand for proceedings consistent with this opinion.

IT IS SO ORDERED.

I CONCUR: MICHAEL D. BUSTAMANTE, Judge.

LYNN PICKARD, Judge (concurring in part and dissenting in part).

PICKARD, Judge (concurring in part and dissenting in part).

I concur in most of the Court's opinion, but respectfully dissent from the holding that the Emergency Act preempts the notice-of-claim requirement of the Tort Claims Act. I am convinced by the language of the Emergency Act that Congress intended to supplement, not supplant, state tort law and that the notice-of-claim provision does not directly conflict with any provision of the Act or frustrate the Act's remedial purpose.

Whether a federal law preempts a state statute is generally a question of congressional intent. *Srader v. Verant,* 1998-NMSC-025, ¶ 7, 125 N.M. 521, 964 P.2d 82. When Congress has included a provision expressly defining the preemptive reach of a statute, and when that

provision provides "a reliable indicium of congressional intent with respect to state authority," a court may infer that Congress did not intend to impliedly preempt matters beyond the scope of the express provision. *Freightliner Corp. v. Myrick,* 514 U.S. 280, 288, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) (quoting *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 517, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992)) (internal citations omitted). While this inference does not obviate the need for conflict-preemption analysis, it does inform and limit our inquiry. *See Freightliner Corp.,* 514 U.S. at 288, 115 S.Ct. 1483. Section 1395dd(f) expressly limits the preemptive effect of the Emergency Act. *See id.* ("The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section."). In reviewing the preemptive effect of the Emergency Act on the notice-of-claim requirement, therefore, we look to see whether the notice requirement "directly conflicts" with the Act. I am convinced that it does not.

A state law is in direct conflict with federal law where (1) it is "impossible for a private party to comply with both state and federal requirements," *English v. General Elec. Co.,* 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990), or (2) the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). As the majority acknowledges, a plaintiff seeking to assert an Emergency Act claim against a state medical services provider may comply with both statutes. While it is true that failure to comply with the notice requirement will bar future action against the state, under no circumstances will compliance

with New Mexico's simple notice requirement preclude compliance with the Emergency Act's two-year statute of limitations. *See* § 41-4-16; 42 U.S.C. § 1395dd(d)(2)(C). The test for preemption is not whether noncompliance is possible, but whether compliance with both statutes might be impossible. *Draper,* 9 F.3d at 1393; *see English,* 496 U.S. at 79, 110 S.Ct. 2270.

Federal and state cases addressing the potential conflict between state notice-of-claim statutes and the Emergency Act have uniformly turned on whether compliance with both laws was possible. *Compare Power,* 42 F.3d at 866 (holding that Virginia's requirement that suits cannot be filed until after they are reviewed by a malpractice review panel directly conflicts with the Emergency Act given that review could take longer than two years and state law tolling provisions cannot toll the running of the Emergency Act's two-year statute of limitations); *Parrish,* 856 S.W.2d at 526 (holding that grace period allowed under Texas state law could not toll Emergency Act's statute of limitations); *Reid,* 709 F.Supp. at 855 (holding that Indiana Code's provision that no cause of action against a healthcare provider arises until an opinion has been rendered by a medical review panel directly conflicts with Emergency Act provision that cause of action arises when individual is harmed by hospital's violation of the Act), *with Draper,* 9 F.3d at 1393 (holding that Oregon's one-year tort claim notice requirement neither precludes compliance with the Emergency Act nor stands as an obstacle to the purpose of the Act, but simply addresses a historical concern that governmental bodies have prompt notice of the claims against them); *Hardy,* 164 F.3d at 794-95 (holding New York's 90-day notice-of-claim requirement not preempted by the Emergency Act because neither

directly conflicting with the Act nor unduly burdensome). Like the statutes at issue in *Draper* and *Hardy,* the only two cases directly on point, New Mexico's notice-of-claim requirement is a simple notice statute without any procedural conditions that could run afoul of the Emergency Act.

Although notice statutes do operate like statutes of limitations since they are conditions precedent to filing suit, the purpose and scope of the two laws are notably different. *See Ferguson,* 99 N.M. at 197, 656 P.2d at 247. The purposes of a notice requirement are (1) to allow investigation of a matter while the facts are accessible, (2) to question witnesses, (3) to protect against simulated or aggravated claims, and (4) to consider whether to pay the claim or refuse it. *Id.* at 196, 656 P.2d at 246. The written notice required by Section 41-4-16(A) is limited to the time, place, and circumstances of the loss or injury. Nothing more is required. By contrast, a statute of limitations requires that a lawsuit be commenced within the applicable period. The requirements for filing the lawsuit are significantly more cumbersome than the requirements for giving notice. *Compare* Rules 1-008 through 1-011 NMRA 2001 (form and content of pleadings) *with* § 41-4-16(A).

Furthermore, the notice requirement does not "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines,* 312 U.S. at 67, 61 S.Ct. 399. The purpose of the Emergency Act is to prevent "patient dumping," the practice of refusing emergency medical treatment to patients without insurance or who are unable to pay for services. *Power,* 42 F.3d at 856. New Mexico's notice-of-claim requirement does not stand as an obstacle to this purpose. Rather, it "simply addresses a concern that the

[Emergency] Act does not, namely the historical concern of governmental bodies that they be given reasonably prompt notice of tort claims against them." *Draper,* 9 F.3d at 1393.

In addition, I disagree with the majority's reliance on *Felder,* 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123. In my view, *Felder* does not support the proposition that a state notice-of-claim statute is necessarily preempted by a federal statute creating a federal cause of action. The statute at issue in *Felder,* namely 42 U.S.C. § 1983, is notably different from the Emergency Act. Section 1983 was enacted to hold state actors liable for violating an individual's federal civil rights. *See Felder,* 487 U.S. at 139, 108 S.Ct. 2302. In reaching its conclusion that 42 U.S.C. § 1983 preempted state notice statutes, the Court relied on the inherent conflict between the purpose of the statute and a state law requirement that a victim seek redress from the offending state. *Felder,* 487 U.S. at 141, 108 S.Ct. 2302. The Court also noted that, given the unique nature of civil rights violations, plaintiffs may be unaware of the merit of their claim for some time. *Id.* at 146 n. 3, 108 S.Ct. 2302. An Emergency Act claim, on the other hand, is not as amorphous. Finally, unlike the Emergency Act, 42 U.S.C. § 1983 does not include a provision limiting the scope of the statute's preemption of state law. *Compare* 42 U.S.C. § 1395dd(f) *with* 42 U.S.C. § 1983.

As I conclude that the notice requirement is not preempted, I must address the issue of whether factual questions exist regarding compliance with it. I agree with the trial court that genuine issues of fact exist.

For the foregoing reasons, I respectfully dissent from the Court's holding that the Emergency Act preempts the

notice-of-claim requirement. With the exception of my disagreement with this preemption issue, I fully concur in the remainder of the opinion.

APPENDIX B

THIRD JUDICIAL DISTRICT COURT
COUNTY OF DOÑA ANA
STATE OF NEW MEXICO

MELVIN GODWIN and CONNIE GODWIN,

Plaintiff,

vs.

EMERGENCY HEALTH SERVICES ASSOCIATES OF NEW MEXICO, P.C., a New Mexico Corporation, MARTIN J. BOYD, M.D., and MEMORIAL MEDICAL CENTER, a New Mexico Corporation,

Defendant.

No. CV-96-425
Judge Robles

AMENDED ORDER

(Filed Feb. 4, 1999)

THIS MATTER came before the Court on (1) Memorial Medical Center's ("MMC's") Motion for Summary Judgment on Plaintiff Melvin Godwin's claim under the Emergency Medical Treatment and Active Labor Act, ("EMTALA"), 42 U.S.C. § 1395dd; (2) MMC's Motion for Summary Judgment contending Plaintiff Melvin Godwin failed to comply with the notice requirement of the New Mexico Tort Claims Act ("NMTCA"), NMSA 1978 § 41-4-1 *et seq*; (3) MMC's Motion for Reconsideration or in the Alternative Motion for Certification of Interlocutory Appeal; (4) MMC's Motion for Partial Summary Judgment on Counts II and III of the Second Amended Complaint and (5) Plaintiffs' Motion for Partial Summary Judgment seeking a ruling that the NMTCA's immunity provisions and damages cap does not apply to Plaintiffs' EMTALA claim. Oral argument was waived by the parties, and the matter proceeded on the memoranda of law presented.

After considering the pleadings, the parties' respective briefs, and being fully advised in the premises, the Court finds as set forth fully below.

The Court finds that there is a material issue of fact as to whether MMC provided an adequate screening of Plaintiff Melvin Godwin, within its capability, in accordance with EMTALA. Therefore, the Court denies MMC's Motion for Summary Judgment on Plaintiff Melvin Godwin's EMTALA claim.

The Court further finds that there are material questions of fact regarding incapacity and estoppel as to the issue of notice under the NMTCA, as raised in the MMC's Motion for Summary Judgment. Therefore, the Court denies MMC's Motion for Summary Judgment contending that Plaintiff Melvin Godwin failed to comply with the NMTCA's notice requirement.

The Court FINDS that MMC's Motion for Reconsideration of the EMTALA issue and the notice issue is not well-taken and is denied.

The Court FINDS that MMC's Motion for Partial Summary Judgment on Counts II and III of the Second Amended Complaint is well-taken and is granted.

The Court FINDS that Plaintiffs' Motion for Partial Summary Judgment seeking a ruling that the immunity provisions and damage cap do not apply to their EMTALA claims is not well-taken and is denied.

The Court FINDS that the Court's decision on MMC's EMTALA-based Motion for Summary Judgment, MMC's notice-based Motion for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment relating to the application of the NMTCA to EMTALA involve controlling questions of law, as to which there is substantial

ground for difference of opinion. The Court also finds that an immediate appeal from the decision may materially advance the ultimate termination of the litigation and that the decision entered herein by the Court does not practically dispose of the merits of the action.

The Court further finds that the Court's decision, as reflected in its April 3, 1998 Order, that the NMTCA's notice provision barred Plaintiff Connie Godwin's claim against MMC under EMTALA involves a controlling question of law as to which there is substantial ground for difference of opinion. The Court finds that an immediate appeal from the April 3, 1998, decision may materially advance the ultimate termination of the litigation and that the decision does not practically dispose of merits of the action. The Court certifies that the current Order is not final under Rule 1-054(C)(2) NMRA 1998 as to Connie Godwin's claims against MMC.

The Court specifically finds that the following issues meet the standard for an interlocutory appeal under NMSA 1978, § 39-3-4:

1. Whether Plaintiff Melvin Godwin created a fact issue sufficient to rebut MMC's Motion for Summary Judgment seeking the dismissal of the EMTALA claim, more specifically delineated as:

    a. Whether an inadequate screening-based EMTALA claim under 42 U.S.C. §1395dd(a) requires evidence of disparate treatment.

    b. Assuming evidence of disparate treatment is required to support an inadequate screening-based EMTALA claim under 42 U.S.C. §1395dd(a), whether Plaintiff Melvin Godwin submitted facts sufficient to rebut MMC's

entitlement to summary judgment on this claim;

c. Whether Plaintiff Melvin Godwin submitted facts of actual knowledge of the requisite emergency medical condition sufficient to rebut MMC's entitlement to summary judgment dismissal of Plaintiff Melvin Godwin's discharge-based EMTALA claim under 42 U.S.C. §1395dd(b).

2. Whether Plaintiff Melvin Godwin created a fact issue on either incapacity or estoppel sufficient to defeat MMC's Motion for Summary Judgment on the issue of notice under the NMTCA;

3. Whether the EMTALA preempts application of the notice requirement in NMSA 1978, § 41-4-16 of the NMTCA; and

4. Whether NMSA 1978, §41-4-19, the damages cap provision of the NMTCA, is applicable to civil actions brought under the EMTALA that are based on the conduct of an individual who is not a public employee.

IT IS THEREFORE ORDERED that Defendant MMC's Motion for Summary Judgment on Plaintiff Melvin Godwin's Claim brought pursuant to EMTALA and Defendant MMC's Motion for Summary Judgment pursuant to the NMTCA regarding lack of timely notice are denied. MMC's Motion for Reconsideration on these two rulings is also denied.

IT IS THE FURTHER ORDER OF THE COURT that MMC's Motion for Partial Summary Judgment on Counts II and III of the Second Amended Complaint is granted. Counts II and III relate to Plaintiffs' efforts to hold MMC vicariously liable for the alleged negligence on Martin

Boyd, M.D. Counts II and III of the Second Amended Complaint are hereby dismissed with prejudice.

IT IS THE FURTHER ORDER OF THE COURT that Plaintiffs' Motion for Partial Summary Judgment seeking a ruling that the NMTCA's immunity provisions and damage cap does not apply to their EMTALA claim is denied.

IT IS THE FURTHER ORDER OF THE COURT that the Order and decision regarding MMC's EMTALA-based Motion for Summary Judgment, MMC's notice-based Motion for Summary Judgment, Plaintiffs' Motion for Partial Summary Judgment concerning the NMTCA's immunity provisions and damage cap, and the Court's previous dismissal of Plaintiff Connie Godwin's EMTALA claims against MMC all involve controlling questions of law as to each of the issues raised by summary judgment for which there is substantial ground for difference of opinion, this decision does not practically dispose of the merits of the action, and that an immediate appeal from this Order may materially advance the ultimate termination of the litigation.

/s/ Robert E. Robles
THE HONORABLE
ROBERT E. ROBLES
District Judge

Approved:

LAW OFFICE OF T.A. SANDENAW

/s/ Leonard J. Piazza
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APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

June 4, 2001

NO. 26,919

MELVIN GODWIN and
CONNIE GODWIN,

Plaintiffs-Respondents,

vs.

MEMORIAL MEDICAL CENTER,

Defendant-Petitioner.

ORDER

WHEREAS, this matter came on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised, Chief Justice Patricio M. Serna, Justice Joseph F. Baca, Justice Gene E. Franchini, Justice Pamela B. Minzner, and Justice Petra Jimenez Maes concurring;

NOW, THEREFORE, IT IS ORDERED that the petition hereby is GRANTED and a writ of certiorari shall issue to the New Mexico Court of Appeals; and

IT IS FURTHER ORDERED that a subsequent order shall be entered identifying the issue(s) upon which the petition is granted and setting forth instructions regarding a briefing schedule, if any.

IT IS SO ORDERED.

WITNESS, The Hon. Patricio M. Serna, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 4th day of June, 2001.

(SEAL)

/s/ Kathleen Jo Gibson
Kathleen Jo Gibson, Chief Clerk
of the Supreme Court of the
State of New Mexico

APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

April 26, 2002

NO. 26,919

MELVIN GODWIN and
CONNIE GODWIN,

Plaintiffs-Respondents,

vs.

MEMORIAL MEDICAL CENTER,

Defendant-Petitioner.

Consolidated with:

NO. 26,922

MELVIN GODWIN and
CONNIE GODWIN,

Plaintiffs-Petitioners,

vs.

MEMORIAL MEDICAL CENTER,

Defendant-Respondent.

ORDER

WHEREAS, these matters came on for consideration upon petitions for writ of certiorari filed pursuant to Rule 12-502 NMRA, and the Court having considered said petitions and being sufficiently advised, issued its writs of certiorari on June 4, 2001, and, after further consideration of the petitions, briefs, and oral argument by the parties, the judgment of the Court is that the writs shall be quashed, Chief Justice Patricio M. Serna, Justice Joseph

F. Baca, Justice Gene E. Franchini, and Justice Petra Jimenez Maes concurring, Justice Pamela B. Minzner recusing;

NOW, THEREFORE, IT IS ORDERED that the writs of certiorari issued on June 4, 2001, hereby are QUASHED; and

IT IS FURTHER ORDERED that the record proper shall be returned to the New Mexico Court of Appeals.

IT IS SO ORDERED.

WITNESS, Honorable Patricio M. Serna, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 26th day of April, 2002.

(SEAL)

/s/ Kathleen Jo Gibson
Kathleen Jo Gibson, Chief Clerk
of the Supreme Court of the
State of New Mexico